substance of the Common Law Procedure Acts of 1854 and 1855. The distinguishing feature of Baron Bramwell's judicial character was sound common sense. This and the added advantage of a business training made his decisions in the field of mercantile law second to those of no other English judge. He was singularly successful at *Nisi Prius*, seeming always to be on terms of perfect mutual understanding with the jury. Especially admirable was his conduct of criminal cases. Few guilty men tried before him escaped; but it has been said that "to any man in danger of suffering from unfairness, to have Sir George Bramwell on the judgment seat was better than to have enlisted the services of the best advocate at the bar." In 1876 he was made a Lord Justice of Appeal, and on his retirement was raised to the peerage. He took an active part in the proceedings of the upper house, combating vigorously all kinds of "paternal legislation." He died at his home in Edenbridge, Kent, in 1892. Baron Bramwell was great because of his force of character, and Mr. Dicey, who compares him to Dr. Johnson, has well written, "He was manly in the best sense of the word, simple and natural."

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# RECENT CASES.

ADMIRALTY — GENERAL AVERAGE. — Owing to a severe storm, a tug towing barges cut them adrift for the purpose of saving itself, so that they were lost. *Held*, that the tug was not bound up with the barges into a single maritime adventure so as to be subject to the law of general average. *The J. P. Donaldson*, 17 Sup. Ct. Rep. 951, reversing 21 Fed. Rep. 671.

The case presents a novel and interesting application of the law of general average. The Supreme Court agrees with the lower court in that the sacrifice must be made for the benefit of the common adventure. 2 Arnould on Ins., 5th ed., 813. But it holds that the adventure is not common. The reasoning is that, as the tug is not a common carrier (*The Burlington*, 137 U. S. 386), there is no such bailment of the barges as to authorize the captain of the tug to cut them loose. This common law distinction in admiralty law is at least suspicious. The court relies on the case of *Ralli* v. *Troop*, 157 U. S. 386, for a criticism of which case see article on General Average, by Judge Lowell, 9 HARVARD LAW REVIEW, 185.

AGENCY — FELLOW SERVANTS — SAFE APPLIANCES. — One of the defendant's employees, in charge of a barrel used for heating water by means of steam, negligently left a plug in the escape pipe, where it had been put a month before, when the apparatus was being used for cold water. When the steam was turned on, the barrel exploded, injuring plaintiff, another employee. *Held*, that defendant was not liable. *Crowell* v. *Thomas*, 46 N. Y. Supp. 137.

It is doubtful whether this act of negligence should be regarded as a failure by the employee to keep the apparatus in a safe condition, or merely as a careless performance of one of his regular duties. Unfortunately, the court do not discuss this question. The former seems the more reasonable view of the facts, in which case the decision is wrong. The master is obliged to use ordinary care to keep machinery in a safe condition, and is not relieved from that obligation by delegating the management of the machine to a servant. See *Corcoran* v. *Holbrook*, 59 N. Y. 517; *Moynihan* v. *Hills Co.*, 146 Mass. 586.

AGENCY — RATIFICATION. — *Held*, that a forged instrument cannot be ratified. *Henry Christian Building & Loan Association* v. *Walton*, 37 Atl. Rep. 261 (Pa.).

This is in accord with the weight of authority. *Brook* v. *Hook*, L. R. 6 Ex. 89; *Workman* v. *Wright*, 33 Ohio St. 405; *Shisler* v. *Vandike*, 92 Pa. St. 447; *contra*, *Greenfield Bank* v. *Crafts*, 4 Allen, 447. The great objection to the Massachusetts view, expressed in the last mentioned case, is that the forger does not purport to act for anybody. He professes to be the person whose name he signs. It is difficult to

see how this personation can be turned into an agency by any means. Of course, the person whose name is signed may so act as to be estopped to deny that he signed it himself; but that is entirely distinct from a ratification.

BILLS AND NOTES — BONA FIDE PURCHASER — PLEDGE. — *Held*, that where the maker has a good equitable defence against the payee of a note, the indorsee before maturity, taking the instrument as collateral security for a debt of the indorser, is a *bona fide* purchaser only to the extent of the debt secured. *Yellowstone National Bank* v. *Hagnon*, 48 Pac. Rep. 762 (Montana). See NOTES.

CONSTITUTIONAL LAW — DISTRIBUTION OF POWER OF GOVERNMENT — JUDICIAL POWERS. — The Constitution of Connecticut provides that the power of government shall be divided into three distinct departments. An act of the Legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the Superior Court, or a judge thereof, on appeal, should approve the plan of construction. *Held*, that the power which the Superior Court, or a judge thereof, was required to exercise was legislative, and not judicial, and therefore could not be exercised by them. *Appeal of Norwalk St. Ry. Co.*, 37 Atl. Rep. 1080 (Conn.).

How far the judiciary may exercise functions which in themselves are not purely judicial is a question much discussed. The principal case is an interesting one in this connection.

CONSTITUTIONAL LAW — FEDERAL JURISDICTION. — An officer of the United States is not liable to a criminal prosecution in the courts of a State for acts done by him in the course of his duties under the laws of the United States; and a writ of *habeas corpus* will be issued by a Federal court to release him from the custody of the State authorities. *In re Waite*, 81 Fed. Rep. 359. See NOTES.

CONTRACTS — ACCORD AND SATISFACTION. — A smaller sum paid and accepted in satisfaction of a debt already matured operates to discharge the debt. *Clayton* v. *Clark*, 21 So. Rep. 565. See NOTES.

CONTRACTS — ATTORNEY AND CLIENT — CHAMPERTY. — *Held*, that an agreement whereby an attorney was to pay all the costs of conducting a suit, and was to receive $33\frac{1}{3}$ per cent of the proceeds as his fee, is champertous and void. *Peck* v. *Henrich*, 173 Sup. Ct. Rep. 927. See NOTES.

CORPORATIONS — ESSENTIAL ATTRIBUTES. — A Pennsylvania statute provides that a "partnership association" may be formed with shares transferable on certain conditions, and limited liability for debts; that the business shall be conducted by a board of managers; and that such association shall buy and sell land, and sue and be sued, in the association name. *Held*, that an association formed under this statute is not a corporation. *Edwards* v. *Warren Linoline & Gasoline Works, Limited*, 47 N. E. Rep. 502 (Mass.).

The court inclined toward a different decision, but considered the question settled in Massachusetts. The authorities generally are irreconcilable as to the essential attributes of a corporation. The best guide to the essence of a corporation is the reason for the existence of such an institution. The obvious reason why individuals combine and apply to the legislature for corporate rights is that they wish to act as a body in certain business matters. It is the legislative authority to act collectively which is the essential attribute of a corporation; it is the only one common to all. Attributes such as limited liability and continuous succession seem to be merely incidental reasons for the existence of some corporations. Corporations can exist without them, hence they are not essential. If legislative authority to act collectively is the essential attribute of a corporation, and if, as is universally admitted, the name "corporation" is immaterial, then every body of men having this legislative authority is a corporation. See opinion of Hand, Senator, in *Gifford* v. *Livingston*, 2 Denio, 395–398.

CRIMINAL LAW — INSANITY AS A DEFENCE. — *Held*, that where insanity is set up as a defence to an indictment for murder, unless it appears that the prisoner was not conscious, at the time of the killing, that the act which he was doing was morally wrong, he is responsible, even if it be shown that he was impelled to its commission by an irresistible impulse. *Genz* v. *State*, 37 Atl. Rep. 69 (N. J.).

The court here accepts fully the rule of *McNaghten's Case*, 10 Cl. & F. 200, as applied in *State* v. *Spencer*, 21 N. J. Law, 196, and followed in New Jersey, as the court says, for fifty years. This test of criminal responsibility on the part of insane persons was, at its inception, in accordance with the teachings of medical science, but has long been outgrown. It is now wholly untenable, and should be given up in spite of the rule of *stare decisis*. The best discussion of the subject is by Judge Somerville, in *Parsons* v. *State*, 81 Ala. 577. His argument against retaining the old test would seem to be conclusive, though the authorities in this country are still about equally divided.

DAMAGES — LIABILITY FOR GRATUITOUS MEDICAL SERVICES. — In an action for personal injuries caused by defendant's negligence, *held*, that the plaintiff can recover for the value of the services of the doctors and nurses, and it is immaterial whether plaintiff will ever have to pay for such services. *Denver & Rio Grande R. R. Co.* v. *Lorentzen*, 79 Fed. Rep. 291.

If the true rule as to such damages is that plaintiff shall recover only for the expense to which he is actually put, this decision is wrong. This was the view taken by the court in *Peppercorn* v. *Black River Falls*, 61 N. W. Rep. 79 (Wis.). But this is open to the objection that under such a rule the friends of the plaintiff would be treated as giving their services, not to the plaintiff, but to the wrongdoer. The proper view, and the one sustained by the weight of authority, would seem to be that these services have been necessitated by defendant's wrong, and the defendant should pay for them. The plaintiff is the proper person to be paid for them, since they were rendered for him. That they cost him nothing is immaterial. He recovers, not for their cost, but for their value. *Brosnan* v. *Sweetser*, 127 Ind. 1.

DAMAGES — MEASURE OF DAMAGES IN EXECUTORY CONTRACT OF SALE. — A agreed to sell certain boilers to B, a corporation, of which C was the agent and largest stockholder. The goods were afterwards damaged. A refused to deliver except at the original price, and resold to a third person. C bought them on his own account. The cost of repairing was slight. In an action by B for breach of contract, *held*, that, B having an opportunity through its agent to purchase the boilers and repair them, it could recover only the cost of repairs, under the doctrine that plaintiff must use reasonable care to avoid the consequences of defendant's wrong. *Cunningham Iron Co.* v. *Warren Mfg. Co.*, 80 Fed. Rep. 878.

The rule relied on seems to have no application. The court allow recovery for the cost of repairs irrespective of the price paid for the boilers, but it is difficult to see why B should be under any duty to buy the boilers and repair them. C's transaction has no connection with the original contract, and, even if it were for B's benefit, any profit made out of it should belong to B, and not to the wrongdoer. *Wolf* v. *Studebaker*, 65 Pa. 459. The true measure of damages for breach of contract is the value of the contract which, in a case like the present, is the difference between the contract price and the value of the goods at the time and place fixed for delivery. Where there is a market price, that is usually taken as the best evidence of value, but it is not conclusive. 2 Sedg. on Dam., 8th ed., § 734 *et seq.*

EVIDENCE — COMPETENCY — GRAND JURORS. — *Held*, that a grand juror may be required in a court of justice to disclose testimony given before the grand jury, though the testimony so disclosed is to be used for purposes other than the impeachment, or trial for perjury, of a witness. *Hinshaw* v. *State*, 47 N. E. Rep. 157 (Ind.).

This case departs from the common law rule which protected the proceedings of the grand jury, except for the purposes referred to above. *State* v. *Fassett*, 16 Conn. 457. The reasons for keeping secret the grand jury's proceedings are, first, to insure free disclosures to and discussion by the grand jury; secondly, to prevent perjury and subornation of perjury by keeping the evidence secret; thirdly, to prevent the escape of the accused by keeping the indictment secret. *Commonwealth* v. *Mead*, 12 Gray, 167. In the later cases, the general opinion seems to be that these reasons are outweighed when in the opinion of a court justice demands the disclosure of the proceedings. It is a matter which depends largely on precedent, but the tendency is toward the broader rule, with the limitation that it may not be shown how the individual jurors voted, or what they said in their deliberations. *U. S.* v. *Farrington*, 5 Fed. Rep. 343. It seems obvious that many reasons for permanent secrecy as to proceedings of a petit jury do not apply in the case of the grand jury.

EVIDENCE — PROOF OF OTHER CRIMES THAN THAT CHARGED. — On trial of defendant for arson of a building in New York, *held*, that evidence tending to prove the defendant guilty of arson of a building in New Jersey was admissible to corroborate one of the government's witnesses. *People* v. *Zucker*, 46 N. Y. Supp. 766. See NOTES.

EVIDENCE — QUESTION — COMPETENCY. — *Held*, that a witness may be asked, on cross-examination, if he has not been indicted for crime. *Clark* v. *State*, 40 S. W. Rep. 992 (Tex.).

This question has given rise to a considerable difference of opinion. While it is largely a discretionary matter, the better view seems to be that such questions are admissible. *Clemens* v. *Conrad*, 19 Mich. 174. It is only by investigation of this sort that the jury can learn what manner of man is testifying. It can hardly be supposed that a witness will testify to an indictment against himself which never existed, and if

he was wrongly indicted he is allowed to explain the circumstances. While it is true that an indictment is matter of record, the rule that such matter should be proved by the record cannot properly be applied to admissions made by a witness under cross-examination on collateral matters. Thompson on Trials, § 467.

EVIDENCE — RAPE — PARTICULARS OF COMPLAINT. — *Held*, that, in a prosecution for assault with intent to commit rape, evidence of the particulars of the complaint made by the prosecutrix to her husband some hours after the alleged commission of the offence are inadmissible. *Harmon* v. *Territory*, 49 Pac. Rep. 55 (Okl.).

In all cases of prosecution for rape, it is important to show that the prosecutrix subsequently made complaint; otherwise the suspicion arises that there was consent. Accordingly, many courts have followed the principal case, in holding that the fact of complaint might be shown, but not the particulars thereof. The reason for this distinction has never been clear. In *Reg.* v. *Walker*, 2 Moo. & R. 212, Baron Parke, while following the prevailing usage, said that he had never been able to understand the reasons for it, and that "the sense of the matter certainly was that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said." This more rational view has been adopted in a recent English case, *Reg.* v. *Sillyman*, 74 L. T. Rep. 730, and by some American courts. *Johnson* v. *The State*, 17 Ohio, 595; *State* v. *Kinney*, 44 Conn. 153.

MORTGAGES — MERGER. — *Held*, that, where a lease for years and an equity of redemption come into the same hands, the legal estate may merge in the equitable, if the parties apparently so intended. *Hudson, etc. Co.* v. *Glencoe, etc. Co.*, 41 S. W. Rep. 450 (Mo.).

This is a direct departure from the generally accepted rule that a legal estate cannot merge in an equitable, *Litle* v. *Ott*, 3 Cranch C. C. 416, and can be justified on no principle. It may be explained as part of the policy in many States of making a "fusion" of law and equity in mortgage cases, and treating the mortgagor's rights for some purposes as legal. This "fusion" usually results, as in the principal case, in a disregard of both legal and equitable principles.

PERSONS — INFANCY — ESTOPPEL. — In an action to foreclose a mortgage, *held*, that the defendant was not estopped from denying his infancy, because he had falsely represented himself to be of age and thereby induced the plaintiff to make the contract. *New York Building Loan Banking Co.* v. *Fisher*, 45 N. Y. Supp. 795.

The case is undoubtedly supported by the weight of authority. Bigelow on Estoppel, 5th ed., 605; *Merriam* v. *Cunningham*, 11 Cush. 40; *Alvey* v. *Reed*, 114 Ind. 148; *Burley* v. *Russell*, 10 N. H. 184, accord. *Kilgore* v. *Jordan*, 17 Tex. 341, *contra*. In general, an estoppel would be raised wherever an action of deceit would lie; but even in jurisdictions where such an action against the infant is allowed, (*Fritts* v. *Hall*, 9 N. H. 441,) the courts have not gone so far as to allow the contract to be enforced. Their refusal is grounded upon public policy. The result is that because of the fraud the party should have a right to rescind the contract, and should then be left to an action of tort. 1 Story on Contracts, 5th ed., § 111.

PERSONS — MORTGAGE BY INFANT — DISAFFIRMANCE. — A minor used the proceeds of a loan, secured by his trust deed upon certain real estate, in paying off prior encumbrances and in making substantial improvements on the property. At majority the minor, still holding the property, disaffirmed the trust deed. *Held*, that the lender could enforce the security to the extent of the encumbrances satisfied out of the loan, with interest, and also the remainder of the loan used in the improvements, in case there was any balance after the infant was paid the value of her equity in the property without the improvements. *MacGreal* v. *Taylor*, 17 Sup. Ct. Rep. 961.

For the decision in the court below, see *Utermehle* v. *McGreal*, 1 Tucker's App. Cases, 359. The principal case is important as showing a distinct step toward the adoption of the principle of equity of following money or property into its proceeds. The cases heretofore have inclined to the doctrine that, upon disaffirmance, only the specific *res* received by the infant, if still in his possession, can be retaken by the other party. *Englebert* v. *Troxell*, 40 Neb. 195; *Hawes* v. *Burlington, etc. Ry. Co.*, 64 Iowa, 319. The principle of subrogation is also applied in giving the lender the rights of the prior encumbrancers. The court here asserts that an infant, exercising the right of disaffirmance, is justly protected if placed in a position equivalent to the one occupied at the time of making the transaction disaffirmed, but he shall not be allowed to profit. To attain this, substance, and not form, is to be looked at. The decision goes far toward ameliorating the hardships often imposed on adults by a strict adherence to the old law in regard to infants.

PROPERTY — DEED BY AN ATTORNEY. — *Held*, that a deed from one who has power of attorney passes title, although he does not refer to such power and has no estate in the land so conveyed. *Hill* v. *Conrad*, 41 S. W. Rep. 541 (Tex.).

The case illustrates the rule that the law, regarding the intent of the parties, will not suppose their acts to be in vain, but will carry out the purpose, even if not in the way intended by the parties. The substance and not the form of the instrument is regarded. Powers executed by deed need not refer to the instrument creating the power, if the act to be done can be done only by virtue of the power. Powell on Powers, 111, 114; *Allison* v. *Kurtz*, 2 Watts, 185; *Hough* v. *Hill*, 47 Tex. 148, accord.

PROPERTY — FIXTURES — RIGHTS OF LESSOR AND OF LESSEE'S MORTGAGEE. — A, the lessee of a mine, executed a mortgage to B of certain mining fixtures. C, the lessor, having recovered possession of the land by summary proceedings for non-payment of rent, it was *held* that this termination of the lease deprived B of his right to foreclose the mortgage. *Massachusetts Nat. Bank* v. *Shinn*, 46 N. Y. Supp. 146.

The majority of the court say that the lessee could mortgage merely his own right of removal, which right ended with the destruction of the term. Upon similar grounds it has been held that where a lessee for years makes a grant of a growing crop, and subsequently surrenders his term, the grantee cannot claim a right to the emblements. *Debow* v. *Titus*, 10 N. J. Law, 128. But the better opinion would seem to be that the lessee cannot thus defeat his own grant either by a voluntary surrender or failure to pay rent. Amos & Ferrard on Fixtures, 3d ed., 140. So, where a lessee mortgaged his trade fixtures, and subsequently surrendered his term, it was held that the mortgagee retained for a reasonable time after the close of the lease the right to enter and sever the fixtures. *London, etc. Co.* v. *Drake*, 6 C. B. N. S. 796. The principal case may, perhaps, be supported on the ground that an unreasonable length of time had elapsed between the forfeiture and the mortgagee's attempt to remove the fixtures, and that he was barred by laches.

PROPERTY — PERCOLATING WATER. — A was the owner of land through which ran a brook flowing at all seasons in a defined channel. B, for the purpose of procuring a water supply, cut off the percolating waters which fed the brook, before they reached it, and caused the stream to dry up. *Held*, A was entitled to recover for the damage he had sustained. *Smith* v. *City of Brooklyn*, 46 N. Y. Supp. 141.

This decision seems opposed to the doctrine of *Chasemore* v. *Richards*, 7 H. L. Cas. 349, which has been generally followed in this country. See Cooley on Torts, p. 580. The court professed to follow *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. App. 483, holding the decision in that case inconsistent with *Chasemore* v. *Richards*. These cases seem clearly distinguishable, however. *Chasemore* v. *Richards* stands for the proposition that a landowner may use all the water percolating through his land, before it has reached a well defined channel, while *Grand Junction Canal Co.* v. *Shugar* decides that a landowner cannot use the water percolating beneath the surface if in so doing he also draws off water which has reached a definite channel.

PROPERTY — TAXATION OF WATER POWER. — *Held*, that water power created by the erection of a dam is not appurtenant to the land on which the dam is erected, and cannot be taxed there; but is to be taxed indirectly in the valuation of the mill with which it is used. *Union Water Power Co.* v. *City of Auburn*, 37 Atl. Rep. 331 (Me.). See NOTES.

SURETYSHIP — SUBROGATION OF SURETY TO RIGHTS OF CREDITOR. — The surety on a note providing for an additional payment of ten per cent of the amount in case of suit, as attorney's fees, paid the holder the face of the bill without suit. In an action by the surety against the maker, *held*, that equity will keep the note alive, and that the surety is subrogated to the rights of the creditor before payment. Being obliged to bring suit to collect, he is entitled to the ten per cent attorney's fees. *Beville* v. *Boyd*, 41 S. W. Rep. 670 (Tex.).

Until changed by 19 & 20 Vict. c. 97, s. 5, the English rule was that payment by the surety extinguished the obligation, and the surety could recover only on the collateral contract of indemnity. This rule survives in a few States in this country. *New Bedford Savings Inst.* v. *Hathaway*, 134 Mass. 69. But the authorities generally favor the view that the obligation still exists in equity for the benefit of the surety. Under this rule the surety could recover whatever the note called for, unless met by some equitable defence, such as that he had taken the note up at a discount. Equity would allow recovery only for the amount actually paid, otherwise the surety would be profiting at the expense of his principal. But, as pointed out in this case, that is very different from recovering attorney's fees, for in the latter case the surety is only making himself whole.

TORTS — ACTION FOR MUTILATION OF DEAD BODY. — *Held*, that the father of a child has such a right to its dead body that he may maintain an action against one who, without his consent, performed an autopsy on the dead body. *Burney* v. *Children's Hospital*, 47 N. E. Rep. 401 (Mass.).

This action, though uncommon, is now well established. For a discussion as to the nature of the right infringed, and for authorities, see 10 HARVARD LAW REVIEW, 51.

TORTS — CONVERSION BY PLEDGEE. — A broker who was pledgee of certain securities repledged them without the owner's authority, and for a greater amount than the original pledge debt. *Held*, the broker was guilty of conversion. *Douglas* v. *Carpenter*, 45 N. Y. Supp. 219.

The report does not state whether the pledgor tendered to the broker the money due; and yet, according to the English authorities, if this tender was not made, the decision is erroneous. *Halliday* v. *Holgate*, L. R. 3 Ex. 299. Strangely enough, none of these English cases, or of the American cases which lean in the same direction, were mentioned. The *ratio decidendi* of *Halliday* v. *Holgate* is, indeed, touched upon in the statement that the original pledgor "had the ownership of the securities, but not the right of possession." The court, however, does not follow out this line of thought, and fails to observe that, without the acquisition of this right by means of a tender, the pledgor could not succeed. This is the more remarkable because *Halliday* v. *Holgate* was apparently approved in an earlier New York decision, *Lewis* v. *Mott*, 36 N. Y. 395. Under such circumstances, the principal case cannot be deemed satisfactory authority for any proposition.

TORTS — DECEIT — NEGLIGENCE AS A SUBSTITUTE FOR SCIENTER. — Defendant, a bank president, having abundant opportunities to know the financial condition of the bank, made statements untrue in fact as to the value of its stock, in order to induce plaintiff to buy some of the stock from a third party, and plaintiff did so buy and was damaged in consequence. *Held*, that defendant was liable, even though he believed his statements to be true, if he had no reasonable grounds for his belief. *Trimble* v. *Reid*, 41 S. W. Rep. 319 (Ark.).

The first instruction given by the lower court and sustained by the upper court follows a ruling common in American jurisdictions in allowing unreasonableness of belief to take the place of want of belief in an action for false representations. This is directly contrary to the law in England as settled by *Derry* v. *Peek*, 14 App. Cas. 337, and it is submitted that it is really confounding negligence and deceit. It seems foreign to the nature of the action for deceit to make it supply a remedy for damage due to negligence.

TORTS — INTERFERENCE WITH BUSINESS. — *Held*, that an action can be maintained for inducing a third person to break a contract with plaintiff, where the relation of master and servant was not created by such contract. *Glencoe Sand & Gravel Co.* v. *Hudson Bros. Commission Co.* 40 S. W. Rep. 93 (Mo.).

Plaintiff's business suffered, because defendant, who sold the same kind of goods as plaintiff, threatened to discharge its employees if they traded with plaintiff. *Held* for defendant, as the threats were not wanton but in the course of competition. *Robison* v. *Texas Pine Land Association*, 40 S. W. Rep. 843 (Tex.).

Plaintiff, as treasurer of a labor organization, refused to act in a manner not required by the constitution and by-laws. As a result of a resolution of the members of the organization, plaintiff's fellow workmen refused to work with him, causing his discharge. *Held*, that he was entitled to recover from the organization the damages thereby sustained. *Connell* v. *Stalker*, 45 N. Y. Supp. 1048.

These cases will be interesting to those who are investigating the so called "malicious" torts. In the Missouri case the petition demurred to contained no allegation of malice, but the court did not notice the point, and placed themselves squarely against the doctrine allowing recovery for malicious interference with contracts.

TORTS — NERVOUS SHOCK AND ILLNESS CAUSED BY WILFUL MISSTATEMENT. — Defendant told plaintiff that her husband was seriously injured, and wished her to send a conveyance for him. In consequence, the plaintiff suffered a violent nervous shock which produced illness. She also expended money in reliance upon the statement. Verdict for plaintiff, assessing damages separately for the illness and for the money expended. *Held*, plaintiff could recover both items. *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

The plaintiff was clearly entitled to recover for money expended; *Pasley* v. *Freeman*, 2 T. R. 51. Whether the other item was too remote presents a more difficult question. Wright, J. treated the case as one of the first impression. He thought the doctrine of *Victorian Ry. Commissioners* v. *Coultas*, 13 App. Cas. 222, was not in point, because in that case there was no element of wilful wrong; nor *Allsop* v. *Allsop*, 5 H. & N. 534,

which was decided largely on the particular form of action. He held, however, that there could be recovery for the illness, on the ground that the defendant had wilfully done an act calculated to cause physical pain to the plaintiff, and pain had, in fact, resulted from his act. In so doing he had infringed her legal right to personal safety.

TORTS — PROXIMATE CAUSE — BODILY DAMAGE CAUSED BY MENTAL SHOCK. — *Held*, in an action to recover damages for an injury sustained through the negligence of the defendant, there can be no recovery for a bodily injury resulting from mere fright without impact. *Spade* v. *Lynn & Boston R. R. Co.*, 47 N. E. Rep. 88 (Mass.).

It is interesting to note the trend of judicial opinion upon this question. The Supreme Court of Massachusetts follows the decisions in *Victorian Ry. Commissioners* v. *Coultas*, 13 App. Cas. 222, and in *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 107. (See 10 HARVARD LAW REVIEW, 387.) While admitting that bodily injury may flow proximately from negligence, causing mental shock, the court justifies its conclusion on the rather unsatisfactory ground that in practice it is impossible to administer any other rule than that there can be no recovery for physical damage caused by mental disturbance, where there is no injury to the person from without.

TRUSTS — CONSTRUCTIVE TRUST — STATUTE OF FRAUDS. — *Held*, that a voluntary conveyance by a husband to his wife, without consideration, but with a parol agreement that the grantee shall hold the land in trust for the grantor, does not create a trust which can be enforced. *Fitzgerald* v. *Fitzgerald*, 47 N. E. Rep. 431 (Mass.).

The basis of the decision is, that, if the land is reconveyed to the grantor, the terms of a parol trust are carried out contrary to the Statute of Frauds, and hence such a parol agreement cannot be shown in evidence. The same principle is laid down in the recent case of *Myers* v. *Myers*, 47 N. E. Rep. 309 (Ill.). In that case, however, the trustee waived the statute, admitted the terms of the trust in an answer to a bill in equity, and declared himself willing to convey to whomsoever the court should decide to be entitled. The court therefore decided that no one else could set up the statute against carrying out the terms of the trust, but that without such a declaration by the grantee there was no trust capable of proof. It is erroneous to assert that there is no trust which can be proved without violating the Statute of Frauds. The statute expressly excepts trusts arising by implication of law. The express trust of the parties cannot of course be enforced. If, however, the grantee refuses to carry out the express trust, equity should impose on him a constructive trust to reconvey to the grantor to avoid the fraud of the grantee's retaining possession of what in justice he is not entitled to. The same result is reached practically as if the express trust were enforced. This is a mere coincidence, however. It is an implied trust which is enforced, and the parol agreement is admissible to prove it and not the express trust. The English courts have correctly noted the distinction; *Davis* v. *Whitehead*, [1894] 2 Ch. 133. The conflict in the American courts, *Ryan* v. *O'Connor*, 41 Ohio St. 368, and *Peacock* v. *Nelson*, 50 Mo. 256, makes it important to note the distinction.

TRUSTS — SPECIAL DEPOSIT — INSOLVENT BANK. — X deposited on June 20 to the account of bank C a specific sum in bank B, the correspondent of C, and directed C to pay the amount by telegram to D. B placed the money to the account of C, but did not send it directly to C. C failed on June 22, without making the payment directed. *Held*, C was a trustee of X, and the money could be recovered as a special deposit. *Montagu* v. *Pacific Bank*, 81 Fed. Rep. 602.

The decision is sound, but the reasoning is erroneous, arising from a misconception of the trust *res*. The specific deposit lost its identity as a *res* by being mixed with the funds of the bank of deposit. But as soon as C was credited with the amount by the bank of deposit, the former had a claim as a creditor — a common law claim — against the latter. This claim was not extinguished by any actual payment, because, as the report expressly states, no funds were transmitted from B to C. Nor does it appear from the facts that it was extinguished by any settlement on the books of the bank. The brief interval between the date of deposit and the failure, and the general custom of banking, would be quite conclusive that there was no such settlement. This unsatisfied claim would be held in trust for the depositor, who did not affect it by any subsequent withdrawals against it. The form of a trust *res* may change and the trust relation remain, or a new trust *res* may come into existence during a course of events. A failure to distinguish its form and changes has caused great confusion in the cases. A similar correct result, but similar confusion of reasoning, characterizes the case of *Farley* v. *Turner*, 26 Law J. Ch. 710, cited in the principal case as directly in point. The foregoing reasoning avoids resort to the authority of cases where the assets of a bank are swollen by the intermixture of trust funds, many of which are cited in the principal case.